Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF MPOWER COMMUNICATIONS CORP. ON BROADBAND INTERNET ACCESS NPRM

MPOWER COMMUNICATIONS CORP.

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Summary

Mpower has consistently taken the position that as fiber lines continue to be integrated into traditional telecommunications networks and voice increasingly is carried in packets over fiber, there is a functional convergence in the use of ILEC networks. Consequently, it will become increasingly important that CLECs have access to the entire ILEC network, by means of "end-to-end," functional UNEs, in order to reach their customers.

Nevertheless, Mpower believes it is possible to define broadband access to the Internet as an information service while still maintaining open access to the remaining ILEC network capacity for common carriage. Just as there is presently a presumption that cable provides telecommunications services only by private carriage, Mpower believes there should be a presumption that all ILEC networks – except for the smallest two percent – provide telecommunications services by common carriage.

The presumption that an ILEC is a common carrier should be a strong one but a rebuttable one. If an ILEC is successful in rebutting the presumption of common carriage and is later found to be acting as a common carrier but excluding CLECs from UNE access to their networks, there should be extremely severe penalties for their anti-competitive behavior.

Sharing access to the ILEC network would help to "fill the pipeline" of the ILECs with CLEC business. Mpower has summarized this approach as "retail, wholesale or no sale," meaning that the ILEC can provide retail services, it can provide wholesale services or it can lose out on both of those sources of revenue.

If there is to be competition in telecommunications services and specifically, intra-modal competition, ILEC networks must be open. First, replication of the "last mile" is uneconomic and inefficient. Second, openness leads to more widespread development of content, e.g. "killer" applications, which feeds demand for telecommunications services. Third, openness allows CLECs to compete, thus avoiding an inter-modal duopoly with cable. Fourth, without ready access to ILEC networks, CLECs will likely fail, competition will not succeed and re-regulation will be required. Further, the use of open networks is not an untested plan. It has been implemented effectively by the former Australian telecommunications monopoly, Telstra.

ILECs would have an incentive to make wholesale arrangements with CLECs if it were recognized that the parties can agree to minimum bulk orders, minimum dollar commitments and/or "take or pay" arrangements in exchange for speed of provisioning, quality of service commitments and the like. Mpower has proposed that a "FLEX contract" be approved by the FCC to encourage ILECs and CLECs to make such wholesale deals.

The industry needs to find an effective way to move network deployments and competition forward to enhance the economy and meet the needs of consumers. Providing encouragement to and removing disincentives for ILECs to become good wholesale partners with CLECs may be the most effective means to that end and "FLEX contracts" could be a potent tool in achieving that goal.

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Mpower Communications Corp. ("Mpower") hereby submits its Comments on the issues raised by the Federal Communications Commission ("Commission" or "FCC") in its Notice of Proposed Rulemaking ("NPRM") on broadband Internet access issues.

I. Introduction

Mpower agrees with the commentators who argue that the growth of broadband services is of significant importance to America. That growth will likely have an enormous impact on the economy, jobs, entertainment, etc. and should be encouraged. Mpower believes, however, that it is a combination of broadband services and network deployment which must grow, rather than infrastructure alone. In other words, broadband growth must be market driven. Both network deployment and the

development of new service applications are critical to the success of a broadband network and the growth of one without the other will not be successful.

At this point, there is a problem of demand rather than supply. First of all, prices are much too high for what the consumer gets. As reported by the *Wall Street Journal* on January 18, 2002, "With their smaller competitors failing, both [the cable companies and the Bells] boosted their prices sharply last summer to around $50 a month from around $40, further slowing the pace of new subscriptions." [1]

Perhaps equally important, there currently are no "killer" applications available. As explained in a *Wall Street Journal* article of January 28, 2002:

> A while back, there was a compelling reason to get a broadband connection. It was called Napster. And it was crippled by recording-industry lawsuits. If cable and telecom companies want someone to blame for broadband's lackluster growth, how about the record companies, which still aren't giving consumers what they want.[2]

Caution is certainly necessary in making the assumption that "if you build, they will come." Global Crossing is one example of the enormous problems which can arise from building network without regard to market forces.

[1] *Wall Street Journal*, "Plugging In: Tech Lobbyists Seek Bonanza in New Push for Speedy Internet," 1/18/2002.
[2] *Wall Street Journal*, "Broadband Advocates Should Fight to Increase Demand, Not Supply," 1/28/02.

II. Network Convergence

Mpower has commented on the two prior broadband NPRMs,[3] as well as NTIA's request for broadband comments.[4] Mpower has consistently taken the position that as fiber lines continue to be integrated into traditional telecommunications networks and voice increasingly is carried in packets over fiber, there is a functional convergence in the use of incumbent local exchange carrier ("ILEC") networks. As a result, it becomes more difficult to predict what combinations of technology and facilities will be necessary to reach customers with competitive choices. Consequently, it will become increasingly important that competitive local exchange carriers ("CLECs") have access to the entire ILEC network, by means of "end-to-end," functional UNEs, in order to reach their customers.

Nonetheless, Mpower understands and supports the Commission's desire "to develop an analytical approach that is, to the extent possible, consistent across multiple platforms"[5] and to minimize regulation of broadband where there is sufficient competition. Mpower believes it is possible to define broadband access to the Internet as an information service while still maintaining open access to the remaining ILEC network capacity for common carriage.

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[3] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Doc. No. 01-337, Rel. 12/20/01 ("Broadband Docket") and *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Doc. Nos. 01-338, 96-98, 980147, Rel. 12/20/01 ("Triennial NPRM").

[4] Mpower NTIA Comments, filed 12/19/01, in *Deployment of Broadband Networks and Advanced Telecommunications*, National Telecommunications and Information Administration ("NTIA") Doc. 011109273-1273-01.

[5] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Doc. No. 00-185, CS Doc. No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking ("Cable Ruling"), Rel. 3/15/02, ¶73.

III. Broadband ISP Service v. Cable Modem Service

In the Cable Declaratory Ruling,[6] the Commission pointed out that it has long drawn a distinction "between bottleneck common carrier facilities and services for the transmission or movement of information on the one hand and, on the other, the use of computer processing applications to act on the content, code, protocol, or other aspects of the subscriber's information," the latter being "enhanced" or "information services." The Commission also has determined that to the extent cable providers offer telecommunications services, they generally offer private carrier services and not common carrier services.[7]

As the Commission pointed out in this broadband Internet access NPRM, [8] this proceeding "is the functional equivalent to the *Cable Modem NOI*, which considers broadband Internet access services provided over the cable plant." Thus, similarly, in light of a careful review of the various statutory definitions, the Commission concluded in this NPRM that "wireline broadband Internet access services…are information services subject to regulation under Title I of the Act."[9]

The Commission has previously concluded, however, that "an entity is providing a 'telecommunications service' to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service."[10] In fact, ILECs traditionally have provided telecommunications services involving the common carriage of voice and more recently, have provided telecommunications services involving data, both by means of xDSL technologies and by means of fiber technologies.

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[6] *Id.* at fn 139.
[7] *Id.* at ¶54.
[8] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* CC Doc. No. 02-33, CC. Doc. Nos. 95-20, 98-10, Rel. 2/15/02 at ¶ 9 ("Broadband ISP Docket").
[9] *Id.* at ¶16.
[10] *Id.* at ¶ 26.

Simply stated, both cable companies and ILECs provide Internet access services which meet the definition of "information services." Cable networks, however, provide telecommunications by private carriage, whereas the ILEC networks provide telecommunications services by common carriage.

As a result, it is possible for the Commission to provide the parity of analytical frameworks much sought after by the ILECs, by using a consistent definition of "information services" between cable companies and ILECs. One may thereby apply only minimal regulation to such information services whether provided by cable companies or ILECs. At the same time, however, major, long-standing differences between private carriage on cable networks and common carriage on ILEC networks make it reasonable to treat network access requirements quite differently.

IV. Presumption of Common Carriage for ILECs

Just as there is presently a presumption that cable provides telecommunications services only by private carriage,[11] Mpower believes there should be a presumption that all ILEC networks -- except for the smallest two percent -- provide telecommunications services by common carriage since their business has continuously been "telecommunications service," which is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[12] As the Commission has pointed out:

> The Commission has repeatedly found in various contexts that the definition of 'telecommunications ' under the Act is equivalent to 'common carrier' service….Moreover, the D.C. Circuit has held that the FCC's interpretation of

[11] *See,* Cable Ruling, at ¶93.
[12] 47 USC 153(46).

'telecommunications service' as common carrier service is reasonable and permissible.[13]

a) Presumption May Be Rebutted

The presumption that every portion of an ILEC network is used for common carriage should be a strong presumption but a rebuttable one. The burden should be squarely on the ILEC to show, based upon pre-determined standards, that geographically or by product, etc., that any segment of the network is not used for common carriage. This right to attempt to rebut the presumption of common carriage should be exercisable only on a periodic basis, e.g. not more frequently than once every three years. This would preclude ILECs from filing one application after another in order to wear down their opposition by dint of the sheer volume of applications.

If an ILEC is successful in rebutting the presumption of common carriage and is later found to be acting as a common carrier for that segment of its network but excluding CLECs from UNE access to their networks, there should be extremely severe penalties for their anti-competitive behavior. These penalties would need to be developed specifically for this purpose, however, their severity should mirror remedies such as antitrust's triple damages. Remedies might also include a long period of required open access, e.g. five years, or possibly even criminal-style sanctions. In other words, the detrimental impact of an attempt to evade the law should be such that it cannot be a cost-effective alternative.

[13] Cable Ruling at fn 205.

b) Performance As Common Carriers

As presumptive common carriers, ILECs must be held accountable for their performance. Unless ILECs have rebutted the presumption of common carriage, failure to offer and provide fair and non-discriminatory access to their telecommunications networks should result in significant sanctions. As Mpower argued in the UNE performance standards docket,[14] such sanctions could be either monetary or non-monetary penalties. Mpower prefers non-monetary penalties which actually "fix" the problem.

More specifically, national performance measures and standards should be instituted. Based upon those standards, if an ILEC misses a provisioning measure such as "troubles during installation" in one month, it could be required to dispatch a technician, at its cost, for loop trouble reports for the next month. Similarly, if an ILEC misses a measure relating to lack of appropriate facilities in one month, it could be required to pre-qualify or "pre-field" facilities for the next month. Other streamlined enforcement measures could also be developed to assure that CLECs have effective and efficient access to ILEC telecommunications networks.

V. Need for Access to ILEC Networks

It is crucial that CLECs have full access to ILEC networks used for common carriage. Fiber "pipes" are capable of enormous capacity. One strand of fiber can provide more capacity than most end-users will ever need. Consequently, it is generally

[14] Mpower Comments, filed 1/22/02, in *In the Matter of Performance Measurements and Standards for UNEs and Interconnection* ("UNE Performance Docket"), CC Doc. No. 01-318, et al., Rel. 11/19/01.

uneconomic to duplicate the "last mile" to end-users – somewhat like constructing parallel highways. It is very expensive, wasteful, disruptive to the environment and does not achieve significant incremental value.

It is also particularly important to be aware that technological changes are leading to a convergence between the traditional telecommunications networks and the new fiber, broadband networks. Voice and data increasingly use the same or very similar technology. As a result, in the future it will not be very useful to distinguish between voice and data and it will not be possible to treat broadband and traditional network architectures differently.

Already, as a result of new technology and upgraded networks, POTS/voice is being moved from the ILECs' old copper networks onto their new fiber networks.[15] These networks are faster, more reliable, less expensive to maintain and provide better quality service. Given the current convergence of technology, increasingly all ILECs will move voice communications on to their new, upgraded networks.

These facts mean that broadband as well as traditional ILEC networks must be shared to achieve economic efficiency. For competitive companies such as Mpower, which has its own switches but buys or leases transport capacity and loops, this means there must be "end-to-end" unbundled network elements ("UNEs") regardless of technology in the ILEC network or equipment on the ILEC loop. Without access to the complete loop, CLECs cannot provide a full range of competitive advanced services to the public. Further, if there are regulatory, technological or other barriers to using "the last mile" of network -- whether copper, fiber or other technology -- it will become

[15] Sprint testifies that it intends to "replace its traditional circuit switched network with a packet switched network" in order to begin moving its voice traffic, as well as data traffic, by packet switching technology. Testimony of Richard G. Pfeifer, VP, External Affairs, for Centel/Sprint, in Sprint's 2002 Nevada rate case, p. 6.

impossible even to reach our customers. Many other CLECs are in a similar position. Consequently, without "end-to-end" UNEs, i.e. the ability to reach customers regardless of where they are in the telecommunications network, the goal of widespread competition can never be achieved.

Further, sharing access to the ILEC network would help to "fill the pipeline" of the ILECs with CLEC business. Mpower has summarized this approach as "retail, wholesale or no sale," meaning that the ILEC can provide retail services, it can provide wholesale services or it can lose out on one or both of those sources of revenue. Certainly, ILECs should have no incentive to impede good wholesale business deals.

As Qwest pointed out in its Comments, filed February 27, 2001, in the Line Sharing docket:

1) The Commission should do nothing which would erect regulatory barriers which might impede the deployment of fiber loop technology….
2) It is important that the Commission encourage the maximum deployment of broadband services….
3) [T]he key conclusion which can be drawn from the fact that [broadband] services are subject to intense competition from cable modem services is that ILECs and CLECs alike have an economic incentive to work together to maximize the competitiveness of [broadband] offerings…. [and]
4) [I]t is important to keep in mind that CLECs still need access to ILEC loops in order to provide [broadband] services. <u>It would be a serious mistake, in today's marketplace, to allow a situation to develop whereby CLECs were unable to make efficient and cost-effective use of ILEC loops</u>. (Emphasis added.) [16]

ILECs do need to retain control over the choice of technology that is deployed and the timing of when it is deployed. Without this control, ILECs are unlikely to deploy advanced services. For CLECs to obtain meaningful access, however, CLECs need to

[16] Qwest Comments, filed 2/27/01, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Doc. No. 98-147, CC Doc. 96-98, Rel. 1/19/01 ("Line Sharing Order & NPRM"), at 2-3.

participate on a collaborative basis in fundamental network planning decisions. Full disclosure of network capabilities to be deployed needs to be made well in advance of deployment. Thus, the Commission should reserve to ILECs key network architecture deployment decisions but should require that ILECs sponsor collaborative network planning sessions and make timely and full disclosure of all network capabilities.

A crucial concern of such collaborative planning must be to allow the ILECs choices while not preventing CLECs from obtaining meaningful access. Thus, future ILEC infrastructure must provide CLECs with neutral "hand-offs" to assure equal access. Essentially, future ILEC networks must be constructed as if there were structural separation and all telecommunications providers, including both ILECs and CLECs, would have the same opportunities for full access to the network, without technological nor financial impediments to any carrier. ILEC control of network design must not be used as a weapon against competitive carriers.

VI. Encouraging Competition

If there is to be competition in telecommunications services and specifically, intra-modal competition, ILEC networks must be open. First, as noted above, replication of the "last mile" is uneconomic and inefficient so networks must be shared. Second, openness leads to more widespread development of content, e.g. "killer" applications, which feeds demand for telecommunications services. Third, openness allows CLECs to compete, thus avoiding an inter-modal duopoly with cable. Fourth, without ready access to ILEC networks, CLECs will likely fail, competition will not succeed and re-regulation will be required.

The role of openness can be illustrated generally by a comparison of the approaches of some of the computer companies. Apple wanted to control deployment of

both the hardware and the operating system software for its systems and it developed a relatively closed network of suppliers. With controlled access comes control over content. Control over content fails to provide incentives to others to develop and implement content applications. Thus, the network of suppliers fails to expand dynamically.

Microsoft, on the other hand, developed a relatively open approach to its operating systems software that facilitated the development of content. Various content providers benefited, as did Microsoft itself. Microsoft's network of suppliers was able to expand exponentially. With telecommunications systems, CLEC access to the ILEC networks will allow the CLECs to facilitate the development and implementation of content for all end-users of ILEC networks.

As CLECs and ILECs strive to resolve their relationship in the broadband arena, it is vitally important that both sides think beyond the old notions of revenue protection and focus on the battle between networks, i.e. telecommunications versus cable. Open telecommunications networks have great potential to trounce the closed cable networks. Hopefully, the efforts to close the ILEC networks will soon be seen for what they are, a terrible strategic error which it is time to correct.

Certainly the "impair" test[17] can help to gauge the need for openness, i.e. CLEC access. To the extent the ability of CLECs to provide services would be "materially diminished"[18] by an inability to obtain access to wholesale network and/or services from the ILEC, the CLEC is impaired in its ability to compete. As Mpower noted above, the nature of UNEs will need to change to reflect a changing, converging network where the

[17] 47 USC 251(d)(2).
[18] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Docket No. 96-98, Rel. 11/5/99, ("U*NE Remand Order")*, ¶ 51; *see also, Triennial NPRM*, ¶ 7.

services to be provided, e.g. voice or data, are increasingly provided in the same manner regardless of network characteristics and equipment in the line. Whatever the impair test and its context become in the future, however, it is essential that CLECs have access to the new telecommunications networks.

Perhaps just as important as meeting the CLECs' need for openness, however, is developing the ILECs' desire for openness. Openness represents the future strength of the ILEC networks to attract versatile, competing companies and their wholesale business and to encourage an explosion of broadband content. These companies will help to fill the prodigious and rapidly expanding capacity of the ILEC networks. This is good business for ILECs.

As broadband develops, CLECs increasingly will compete to provide enhanced telecommunications services that appeal to businesses. Such content will expand the "pie" and continue to make the telecommunications business a non-zero-sum game. As residential rates are re-balanced to assure that they cover costs[19] and experience is accrued with business applications, those applications will be modified and honed to meet the needs of residential customers and CLECs will expand their focus to provide attractive residential applications, as well. Thus, openness will provide a win-win-win solution for ILECs, CLECs and consumers.

Further, this is not an untested plan. It has been implemented effectively by Telstra, the former Australian telecommunications monopoly. According to former Telstra Wholesale CEO, Rosemary Howard, in a recent paper on the importance of commercializing wholesale on ILEC networks:

- Competition is welcomed, it generates market efficiency, growth and consumer benefits

[19] *See,* Mpower NTIA Comments, pp. 9-10.

- …[C]ommunications today is a dynamic market with much innovation; not a zero sum game
- Competitors can help grow the market for all….
- You are better off when customers and competitors use your network, than when they use you for nothing
- Wholesale is a low cost distribution channel….
- The lack of a commercially rational wholesale market would indicate clear failure to recognize the growth and innovation potential of a truly competitive market.[20] (Emphasis supplied.)

VII. Wholesale Pricing for Competitive Network Access

There remains the contentious issue of pricing, that is, TELRIC pricing. Perhaps the greatest practical limitation in current TELRIC pricing is that it purports to be wholesale pricing but it only covers individual units of merchandise. TELRIC pricing is unlike any other known wholesale pricing in that there are no provisions for volume and term commitments and the resulting "bulk" pricing levels.

Although it may be necessary to allow start-up companies to order and provision the exact quantities of UNEs needed, individual, item-by-item pricing is more analogous to retail pricing than to wholesale pricing. Wholesale arrangements typically have volume and term components and often represent a "package deal." What seems to be missing from UNE pricing is a true wholesale or "bulk" pricing mechanism. The "sizing" of deals for purposes of efficient provisioning and/or to obtain attractive pricing levels just does not seem to be occurring.

ILECs would have an incentive to make wholesale arrangements with CLECs if it were recognized that the parties can agree to minimum bulk orders, minimum dollar commitments and/or "take or pay" arrangements in exchange for speed of provisioning,

[20] Columbia Institute for Tele-Information Conference, paper entitled "Whither Telecommunications Sector Investment? Examining the Role of Wholesaling Access in Stimulating Investment," Columbia University, 3/4/02.

quality of service commitments and the like. Mpower has proposed that a "FLEX contract" be approved[21] to encourage ILECs and CLECs to make such wholesale deals.

Although the telecommunications industry is still – and still needs to be – a regulated industry, if competition is to proceed apace, increasingly market-driven business principles must apply rather than mere regulatory requirements. Thus, ILECs and CLECs should be free to negotiate "package deals" – not subject to "pick and choose" - involving a broad range of business interests, but especially provisioning, quality of service, volume and term discounts and other fundamental terms affecting the business relationship of the parties.

Such FLEX contracts should be available for any similarly situated CLEC to opt into on a fair and non-discriminatory basis. They should only be allowed to opt into the entire agreement, however, rather than be able to pick just "the best parts" of the deal. This should in no way affect the existing statutory and regulatory system but should only add one new tool[22] to facilitate the development of competition and the growth of wholesale markets for telecommunications services.

Why are FLEX contracts – without "pick and choose" -- needed? As the FCC is well aware, arguments were originally made that "pick and choose" would inhibit innovative deal-making.[23] In fact, that seems to have occurred. Although "pick and choose" has existed for several years for interconnection agreements, interconnection

[21] Mpower filed its *Petition for Forbearance and Rulemaking* with the FCC, CC Doc. 01-117, on 5/25/01, outlining its request for approval of "FLEX Contracts."

[22] Both the impair standard and the FLEX contract are viewed as tools to facilitate competition. The impair standard, however, is mandatory and applies to all UNE transactions, whereas the FLEX contract would be voluntary and limited to the contracting parties. The FLEX contract would facilitate a gradual, voluntary transition to competition as opposed to the "all or nothing" characteristic of a mandatory standard. The Commission has been struggling to develop a new regulatory system to encourage greater competition. Perhaps it should let the parties make their own contractual arrangements.

[23] *Local Competition First Report and Order*, CC Dockets 96-98 & 95-185, ¶1303 (Rel. 8/8/96) ("Local Competition Order")

agreements are increasingly standardized. From the standpoint of putting large numbers of contracts in place in a relatively short period of time, standardization is probably the most effective approach. From the standpoint of innovative and effective contracting, however, there is a great sameness and very little meaningful choice. The ability to innovate and the incentive to do so are sorely needed.

The goal is to unleash a torrent of creativity and change in the relationships between ILECs and CLECs. CLECs would like to see ILEC sales people come to them with a briefcase full of deals – as one would find in any normal distribution system. The UNE pricing system provides a "safety net" for CLECs, however, the ability to make useful deals would promote the use of the ILEC networks.

The relationship could be a win-win-win for ILECs, CLECs and customers. Today, however, the relationships are contentious. In the contracting process, even when ILECs would otherwise be willing to modify a proposed term, they feel defensive and threatened by a contracting process which is subject to "pick and choose."

A great deal of time, effort, thought and investment have gone into developing the regulatory environment required by the 1996 Act, however, and this effort should not be wasted by precipitous de-regulation. Such extreme action would lead only to a combination of "regulatory shock" and the ultimate re-monopolization of the telecommunications industry.

In Mpower's view, however, the telecommunications industry is at a critical juncture. ILECs are restless in the face of growing cable and wireless sales. CLECs are struggling to survive in the face of devastatingly poor capital markets. This seems to result at least in part from Wall Street's lack of confidence in the regulatory "cold war" between ILECs and CLECs over UNEs and their provisioning.

The industry needs to find an effective way to move network deployments and competition forward to enhance the economy and meet the needs of consumers. Providing encouragement to and removing disincentives for ILECs to become good wholesale partners with CLECs may be the most effective means to that end and "FLEX contracts" would seem to be a potent tool in achieving that goal. Under this approach, CLECs and ILECs would have the freedom to negotiate mutually beneficial agreements. ILECs can then begin to treat CLECs as valuable customers and not just as competitors or as a regulatory obligation. Most importantly, CLEC business can help ILECs fill their networks. Certainly, this would be a "win-win-win" solution for ILECs, CLECs and customers.

VIII. Conclusions

It is become increasingly important that CLECs have access to the entire ILEC network, by means of "end-to-end," functional UNEs, in order to reach their customers. Nevertheless, Mpower believes it is possible to define broadband access to the Internet as an information service while still maintaining open access to the remaining ILEC network capacity for common carriage.

Further, sharing access to the ILEC network would help to "fill the pipeline" of the ILECs with CLEC business. ILECs would have an incentive to make wholesale arrangements with CLECs if it were recognized that the parties can agree to minimum bulk orders, minimum dollar commitments and/or "take or pay: arrangements in exchange for speed of provisioning, quality of service commitments and the like.

Mpower has proposed that a "FLEX contract" be approved to encourage ILECs and CLECs to make such wholesale deals and Mpower would urge the Commission to approve such a mechanism as soon as reasonably possible.

Respectfully submitted,

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